(1)

Supreme Court, U.S.
FILED

No. 03147 0 APR 21 2004

OFFICE OF THE CLERK

In the

Supreme Court of the United States

NIJOLA LILEIKIS,

Petitioner,

v.

SBC AMERITECH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOHN A. COOK
Counsel of Record

JOHN AUGUST COOK, P.C.
111 WEST WASHJINGTON STREET
SUITE 1900
CHICAGO, IL 60602
(312) 807-4812

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED FOR REVIEW

The first question relates to the refusal of the trial court to extend the discovery cut-off date under the Scheduling Order in order to permit Plaintiff to conduct discovery necessary to prepare her response to Defendant's Motion for Summary Judgment and whether this was a violation of Rule 56(f) of the Federal Rules of Civil Procedure.

The second question in the case is the conflict between the decision of the Court of Appeals in this case and the decision of the Court of Appeals in *Humphrey v. Memorial Hospital's Association,* 239 F.3d. 1128 (9th Cir. 2001), which held that "once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the Americans with Disabilities Act of 1990 to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations". Dr. Mahim Vora, a psychiatrist, had given a written opinion that, although she suffered depression, should return to work on a part-time basis. There was no effort by SBC Ameritech to accommodate Mrs. Lileikis by part-time work although the scheduling of part-time work was available for directory assistance operators.

The third question relates to the decision by the trial court on Defendant's Motion for Summary Judgment that Plaintiff was not disabled under the Americans with Disability Act although there was a written diagnosis by Dr. Vora of major depression, and an opinion of Jean Ascher, LCSW, of a similar diagnosis and plan of treatment. Both Dr. Vora and Ms. Ascher were on the staff of the Psychological Fitness Center in Flossmoor, Illinois. SBC Ameritech had referred Plaintiff to the Center to consider her condition.

The fourth question relates to the refusal of SBC Ameritech to accept delivery of the written opinion of Dr. Vora that Plaintiff could work on a part-time basis because of a company rule that it would not accept such an opinion while an employee was on unpaid leave and was not on disability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, NIJOLA LILEIKIS, is an individual and resident of Sauk Village, Illinois. Respondent, SBC AMERITECH, is a Delaware corporation which operates a directory assistance office in Chicago Heights, Illinois.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding and Rule 29.6 Statement iii
Table of Contents iv
Table of Cited Authorities vi
Petition for a Writ of Certiorari 1
Opinions Below 1
Statement of Jurisdiction 1
Statutes Involved 1
Statement of the Case 2
A. Factual Background 2
B. Statements of Facts 2
C. The District Court Proceedings 6
D. The Court of Appeals Decision 6
Argument 7
1. The Writ of Certiorari should be allowed because the trial court refused to extend the discovery cut-off date under the Scheduling Order so that Plaintiff could conduct discovery necessary to prepare her response to Defendant's Motion for Summary Judgment as provided in FRCP Rule 56(f). A discovery cut-off date pursuant to a Scheduling Order entered prior to the date of Defendant's filing its Motion for Summary Judgment should not bar Plaintiff's application for discovery under FRCP Rule 56(f) 7

2. The decision of the Court Appeals of the Seventh Circuit was in conflict with decisions of the Court of Appeals of the Federal Circuit with respect to the right under FRCP Rule 56(f) to have necessary discovery in order to respond to a Motion for Summary Judgment. This conflict should be resolved because of its importance in the interpretation of the procedures to be followed under FRCP Rule 56. The resolution of

this conflict is important in the administration of the rules relating to summary judgment and FRCP Rule 56 (f) 15

3. The decision of the Court of Appeals of the Seventh Circuit is in conflict with the decision of the Court of Appeals in the Ninth Circuit which held that once an employer becomes aware of the need for accommodation, the employer has a mandatory obligation under ADA to engage in an interactive process with the employee to identify and implement reasonable accommodations. This is an important question for resolution by this Court on the duties and rights of the employer and the employee under the ADA 20

4. Plaintiff's attendance record was either irrelevant or was related to her depression 25

Conclusion 27

Appendix

Appendix A - Seventh Circuit Order Denying Petition for Rehearing and Rehearing En Banc - 01/22/04 . . 1a

Appendix B - Seventh Circuit Order - 12/15/03 . . . 3a

Appendix C - District Court Memorandum and Order - 02/06/03 . . . . . 11a

TABLE OF CITED AUTHORITIES

Cases **Page(s)**

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 1505, 91 L.Ed.2d 202 (1986) 18

Burnside-Ott Aviation Center v. United States, 985 F.2d 1174 (Fed.Cir.1993) 16-19

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 165 (1986) . . . . . .

Dunkin's Donuts of America v. Metallurgical Exoproducts Corp., 840 F.2d 917 (Fed.Cir. 1988) 18, 19

Humphrey v. Memorial Hospitals Ass'n., 239 F.3d 1128 (9th Cir. 2001) 21-25

Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793 (Fed.Cir.1987) 19-20

University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 217 USPQ 505 (Fed.Cir.1983) 19

Statues and Rules

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12101, *et seq.* 1, 2, 20

42 U.S.C. § 12112 20

Fed. R. Civ. P. 11(b) 15

Fed. R. Civ. P. 26(f) 2

Fed. R. Civ. P. 56 . . . . . 2, 15

Fed. R. Civ. P. 56(e) 16

Fed. R. Civ. P. 56(f) . . . . . passim

PETITION FOR WRIT OF CERTIORARI

Petitioner, NIJOLA LILEIKIS, respectfully petitions for a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 22, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals on Order entered January 22, 2004 denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc is reproduced in **Appendix A**. The prior opinion of the Court of Appeals affirming the judgment of the District Court by Order entered December 15, 2003 is reproduced in **Appendix B**. The prior opinion of the United States District Court for the Northern District of Illinois granting summary judgment entered February 6, 2003 is reproduced in **Appendix C**.

STATEMENT OF JURISDICTION

The Court of Appeals' decision was entered on December 15, 2003. Petitioner filed a timely Petition for Rehearing on December 30, 2003. The Court of Appeals denied the Petition for rehearing on January 22, 2004. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Americans with Disabilities Act of 1990, 42 U.S.C. §12101, *et seq*.

Americans With Disabilities Act of 1990, 42 U.S.C. §12112(b)(5)(A) and (B).

Rule 56 of the Federal Rules of Civil Procedure.

Rule 26(f) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Factual Background

This case was an action for employment discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C., §12101, *et seq.* (ADA) by Nijola Lileikis (Mrs. Lileikis) against her employer, SBC Ameritech, Inc. for failure to accommodate her disability of depression and for terminating her employment as of July 30, 1999 due to her disability.

B. Statement of Facts

Mrs. Lileikis worked full-time for SBC Ameritech (and its predecessors) for 18 years from June 26, 1981 when she was 35 years old through July 30, 1999 as a directory assistance operator (Record, hereinafter "R.", 21), Plaintiff's Statement of Uncontested Material Facts Pursuant to Local General Rule 56.1(b)(3)(b), (hereinafter "PSMF") ¶1). The job involved putting on a headset, plugging it into a console, pushing a button, and answering directory assistance calls, looking up phone numbers, giving phone numbers, and disconnecting the call (R. 21, PSMF ¶3). The performance expectations were eight seconds per call. She handled an average of 1200 to 1300 calls per day (R. 21, PSMF ¶3). She stayed in this job due to the availability of time off to accommodate the time for her to care for her family, which consisted of a husband and five children currently ranging from age 36 to 16 (PSMF ¶4) (R. 21, PSMF ¶3). In her deposition she testified:

"A. The whole office hated that job. People hired into directory assistance as a foot in the door to get to other departments. Nobody that could at all afford to stay in directory assistance. Nobody stayed there.

Q. What do you mean by 'afford to'?

A. I stayed because of the flexible hours. Everybody else either went to Chicago or the north suburbs. There were some women, because of personal circumstances, couldn't do that; so they stayed. They couldn't afford to leave". (Dep. 63.)

In 1998, Mrs. Lileikis began to suffer from depression (R. 21, PSMF 7). The depression manifested itself in crying (R. 21, PSMF 8). It reached the point at work where Mrs. Lileikis could no longer talk without crying and had to pass every single call to a service assistant (R. 21, PSMF 8). In addition to having difficulty at work, Mrs. Lileikis was unable to carry on normal household functions such as getting out of bed, cleaning herself, and caring for her family (R. 21, PSMF ¶9). Eventually, she felt she was not functioning at home "in any capacity" (R. 21, PSMF 9).

Mrs. Lileikis tried to find different ways to cope. At work, she took advantage of E-time, a company option available for excused absences (R. 21, PSMF 12). Her manager, Gladys Hanner, was aware that she was applying for E-time (R. 10, B-1 Aff. of Gladys Hanner, attached to Defendant's Motion for Summary Judgment, ¶23). When the manager passed Mrs. Lileikis in the hallway waiting for the posting of the E list, Mrs. Lileikis told her: "I am trying to save my job" (R. 21, PSMF ¶12).

In October 1998, Mrs. Lileikis called the SBC Ameritech Employee Assistance Program and asked for help (R. 21, PSMF 13). Group Manager, Lourdes Fitzgerald, gave Mrs. Lileikis the card for the company's Employee Assistance Program (R. 21, PSMF 13) (R. 20). The Employee Assistance Program referred Mrs. Lileikis to Jean Ascher, LCSW, a psychologist at the Psychological Fitness Center in Flossmoor, Illinois. She met with Ms. Ascher on November 11, 1998, November 25, 1998, December 9, 1998 and January 6, 1999 (R. 21, ¶14) (R. 20) (R. 10, Defendant's Exhibit to the Motion for Summary Judgment, hereinafter "D. Ex." 12).

Ms. Ascher referred Mrs. Lileikis to Dr. Mahim Vora, a psychiatrist at the Psychological Fitness Center in Floosmoor, Illinois, for medical evaluation and medication (R. 10, D. Ex. 12). She met with Dr. Vora on November 18, 1998 (R. 10, D. Ex. 12). In his written diagnosis including his treatment plan and recommendation in the records of the Psychological Fitness Center, Dr. Vora stated as follows:

"DIAGNOSIS

Axis I:	Major Depression, Single Episode
Axis II:	None
Axis III:	History of hysterectomy, peptic ulcer, hypothyroid Migraine headaches
Axis IV:	Severity of Stress: 2
Axis V:	Current GAF: 45 Highest GAF Past Year: 65

Prognosis is fair.

TREATMENT PLAN AND RECOMMENDATION
She will benefit from trial of antidepressant medication. EKG and SMA 12 are ordered. I will start her on antidepressant after results of tests are available. She should continue her individual counseling sessions. I will see her again in two weeks."

Mrs. Lileikis was absent from work on unpaid leave of absence from November 30, 1998 through July 30, 1999, the date of her termination by SBC Ameritech. During this time, she was attempting to cope with her depression by seeking counseling, getting medical help, and trying to arrange for some accommodation at work. She applied for disability benefits and was denied (R. 21, PSMF ¶15) (R. 10, D. Ex. 10). She looked into a leave under the Family Leave Act (R. 21, PSMF ¶16). When she asked about retirement, she was told she had to return to work to qualify for retirement (R. 21, ¶16) (R. 10, D. Ex. 38, D000422-23). However, by this time, she had already exceeded her chargeable absences. She had been away from work since November 30, 1998 (R. 21, PSMF ¶16). Under SBC Ameritech's policy, a return to work would mean being fired for absence from the job (R. 10, P. Dep. 154). SBC Ameritech had a policy of not terminating a person over the phone but terminating that person face to face (R.10, B-1, Aff. of Gladys Hanner, ¶37). SBC Ameritech terminated Mrs. Lileikis effective on July 30, 1999, when she did not return to work (R. 10, B-1, Affidavit of Gladys Hanner, ¶41).

C. The District Court Proceedings

Mrs. Lileikis filed a charge of employment discrimination on the basis of disability with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged employment discrimination. On October 3, 2001, the EEOC issued a "Notice of Suit Rights" to Mrs. Lileikis. She filed her complaint in the United States District Court for the Northern District of Illinois, Eastern Division, within 90 days of receiving the "Notice of Suit Rights".

SBC Ameritech filed a Motion for Summary Judgment and on February 6, 2003, the District Court entered Summary Judgment against Mrs. Lileikis on March 13, 2003. A copy of the District Court opinion is reproduced in **Appendix C**.

D. The Court of Appeals Decisions

Appeal was taken from the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit by Mrs. Lileikis. On December 15, 2003 the Court of Appeals entered its Order affirming the judgment of the District Court. A copy of the opinion of the Court of Appeals is reproduced in **Appendix B**.

Mrs. Lileikis filed a Petition for Rehearing and Petition for Rehearing En Banc on December 30, 2003. On January 22, 2004, the Court of Appeals denied the Petition for Rehearing and the Petition for Rehearing En Banc. A copy of the order of the Court of Appeals denying Plaintiff's petition is reproduced in **Appendix A**.

ARGUMENT

1. The Writ of Certiorari should be allowed because the trial court refused to extend the discovery cut-off date under the Scheduling Order so that Plaintiff could conduct discovery necessary to prepare her response to Defendant's Motion for Summary Judgment as provided in FRCP Rule 56(f). A discovery cut-off date pursuant to a Scheduling Order entered prior to the date of Defendant's filing its Motion for Summary Judgment should not bar Plaintiff's application for discovery under FRCP Rule 56(f).

The decision of the Court of Appeals affirming the decision of the District Court granting summary judgment against Lileikis was erroneous. The District Court denied Plaintiff's Motion to Modify the Scheduling Order to permit discovery necessary for her response to Defendant's Motion for Summary Judgment. The Scheduling Order entered by agreement provided for the close of discovery on November 15, 2002 with expert disclosure extended to December 16, 2002. Defendant's Motion for Summary Judgment was filed on October 16, 2002 and its Appendix, Memorandum and Statement of Uncontested Facts, was filed on October 21, 2002. On December 13, 2002, Plaintiff filed her Memorandum in Opposition to Defendant's Motion for Summary Judgment and her Response to Defendant's Statement of Material Facts Pursuant To Local General Rule 56(1)(b)(3)(A). In Plaintiff's Response to Defendant's Statement of Material Facts, she specifically stated that discovery was necessary in a number of areas. This is clear from the following numbered responses:

> "81. Uncontested, except that the opinion of social worker Jean Ascher in the written form is not admissible and is subject to a deposition of social

worker Ascher which will be requested and added to the Plaintiff's Response to Defendants' motion.

82. Uncontested, except that Ascher's testimony would be inadmissible without a deposition. A deposition of Ascher has been noticed or will be noticed to a short date so that her deposition will be available as part of the response of Plaintiff to Defendant's Motion for Summary Judgment."

Defendants' Statement of Uncontested Material Facts to which the above responses were made, was as follows:

"81. Ascher made out a Comprehensive Assessment (Dep.Exh.12) of Plaintiff (Dep.at 75-76). According to Ascher, Plaintiff reported that she was stressed at work and at home and that her 30-year-old daughter Lisa still lived at home and took no responsibility for herself (Dep.at 17-79). "She hates her job, but needs to stay for the insurance. She cannot take any more days off or she will be fired. (*Id.*)

82. Ascher found that Plaintiff's posture, dress, hygiene, physical features, movements, and speech were all normal, other than a "harassed look" on Plaintiff's face and Plaintiff's habit of eating antacid tablets during the interview (Dep.at 81). Plaintiff's attitude, motivation, feeling, affect, and mood were all within normal limits, except that Plaintiff felt irritable and short-tempered about going to work (Dep.at 81-82). Plaintiff's effect and mood were related to problems she was having with her job and its stresses. (*Id.*)"

Defendant's Statement of Uncontested Material Facts at ¶¶81-82 were based on excerpts from the records of the Psychological Fitness Center as well as questions put to Mrs. Lileikis in her deposition in which she affirmed that some of the statements in the clinical record were as stated. Ascher's deposition was needed so that she could review the clinical record of her examination of Plaintiff, her opinion with respect to Plaintiff's depression and her ability to perform the work as directory assistance operator, and the effect of Plaintiff's medical condition on her ability to perform her work as well the prognosis and treatment needed.

A similar pattern was shown with respect to Dr. Vora. Plaintiff's Response to Defendant's Statement of Uncontested Material Facts ¶108 stated:

> "108. Uncontested, except for question of admissibility and need for Vora deposition."

On this point, Defendant's Statement of Uncontested Material Facts stated:

> "Dr. Vora then wrote a note (Dep.Exh.16) for Plaintiff to give to Ameritech stating that she could return to work on a part-time basis on March 22, 1999 (Dep.at 99; Dep.Exh.7, Plaintiff's Rule 26(a) Disclosures). Vora only wrote the note after Plaintiff said she needed to do something in order to retain her job and she thought that maybe she could return on a part-time basis (Dep.at 99)."

Defendant's Statement of Uncontested Material Facts recognized that Defendant had the Vora handwritten note. Plaintiff quite properly would want the deposition of Dr. Vora to amplify his opinion, to relate it to her work conditions, her

need for continued medical treatment, her prognosis, and any opinion that he might have as to her ability to return to work full-time and, if so, when.

Similarly, there were questions raised in the Response to Defendant's Statement of Uncontested Material Facts as to the need for the deposition of the various SBC Ameritech employees whose statements were included in the Statement of Uncontested Material Facts.

Plaintiff also filed her Statement of Uncontested Material Facts pursuant to Local General Rule 56(1)(b)(3)(B) on the same date. Defendant filed its Response to Plaintiff's Memorandum on December 31, 2002.

On January 3, 2003, Plaintiff filed her Motion for Modification of the Scheduling Order to extend the November 15, 2002 discovery cut-off date[1]. The motion stated that:

---

[1] A discovery cut-off date is set so that both parties know the date when they must complete discovery. With both parties having completed their discovery, the case can proceed forward with the required procedures preparatory to trial including the preparation of a pre-trial memorandum, briefing, and trial. Plaintiff, for purposes of preparing the pre-trial memorandum, brief, and for trial, had completed all of the discovery that she needed to be ready for trail. Plaintiff, by the discovery cut-off date, had all the discovery that she needed to be ready for trial. She had received copies of all of the Defendant's documents relating to her employment history and the development of her disability. She had the records of the Psychological Fitness Center, which had been produced for Defendant at the request of Defendant after Plaintiff gave her permission to Psychological Fitness Center to release her medical records to Defendant. She had her doctor's opinion and the opinion of the psychologist. She was ready for trial and could

a. The Defendant's Motion for Summary Judgment had attached affidavits of three of Defendant's employees concerning certain facts and had attached copies of Defendant's employment records concerning Plaintiff with notation on these records by four other of Defendant's employees;

b. On December 17, 2002, Plaintiff served a notice of deposition, a copy of which was attached to the motion. The Notice of Deposition identified the seven named employees of Defendant and scheduled their examination for December 27, 2002 along with Request for Production of Documents related to that examination; and

c. The letter of the attorney for Defendant to Plaintiff's attorney dated December 20, 2002, stated that the Notice of Deposition was served after the discovery cutoff date, that the notice was untimely, and that Defendant would not produce the seven Ameritech employees listed in the Notice of Deposition.

---

proceed based on her testimony, the testimony of the psychiatrist, the testimony of the psychologist, the documents produced by Defendant, and the ability to call Defendant's employees as adverse witnesses. In addition, she could call other witnesses including her husband, members of her family, her co-employees, and others who had had the opportunity to observe her condition. The fact that Plaintiff needed no further discovery for trial is entirely different from Plaintiff's need to challenge the fact assertions in Defendant's Motion for Summary Judgment. For that, Plaintiff needed the availability of discovery under FRCP Rule 56(f).

On January 10, 2003, Defendant filed its opposition and objection to Plaintiff's Motion for Modification of the Scheduling Order. On January 13, 2003 the Court denied Plaintiff's Motion for Modification of Scheduling Order (R.28). This was in violation of FRCP Rule 56\(f).

The Court had before it only the discovery deposition of Mrs. Lileikis taken by Defendant. In that deposition, she was asked about her condition of health and the work environment. The balance of the deposition was devoted to identifying a large number of documents about which there was no dispute including the office records of Dr. Vora and the Psychological Fitness Center plus the records of SBC. There was no deposition of any medical witness for either Mrs. Lileikis or SBC. There was no testimony by any representative of SBC.

An extension of the discovery cut-off date was a reasonable request. With discovery:

a. Plaintiff would have had the opportunity to conduct a deposition of Dr. Vora in which all of the nuances of Plaintiff's medical condition, its prognosis, the available procedures for improving her condition, her ability to work part-time, and how long that disability would last, were all unknown. Such a deposition would provide information and the medical opinion of Dr. Vora which would amplify the record of his opinion in the medical record of the Psychological Fitness

Center and his written opinion in regard to part-time work[2];

b. Plaintiff would have had the opportunity to conduct the deposition of Jean Ascher, the psychologist at the Psychological Fitness Center who had observed her condition, what she had observed, and other matters which would be material in considering the fact of Plaintiff's mental condition on her ability to work as a directory assistance operator.

c. Plaintiff would have had the opportunity to discover through Defendant's records and through depositions of Defendant's employees the "entire class of jobs or broad range of jobs in various classes" (Court of Appeals Opinion, Appendix 8A-9A).

d. Plaintiff could have required the Defendant to identify any person with whom Defendant had consulted concerning the medical questions, raised

---

[2] The Court of Appeals recognized the nature of Plaintiff's depression. It stated: "Sometime in 1998, Lileikis began to suffer from depression. She could no longer talk on the telephone to customers without crying and had to pass every call to a service assistant. She was also unable to function at home. To cope, she took time off during law call-volume periods. She also called the employee assistance program to ask for help and was referred to a social worker. The social worker referred her to a psychiatrist, who verified she was suffering from "major depression single episode" and prescribed antidepressants." (Appendix 5a.)

by Mrs. Lileikis' medical history and the reports of Dr. Vora and the Psychological Fitness Center. Such persons could have been examined to determine the basis for the Defendant's determination that Mrs. Lileikis was not disabled;

e. Plaintiff would have had the opportunity to examine Defendant's employees concerning the statements in their affidavits and the basis for the statements in the affidavits;

f. Plaintiff would have had the opportunity to examine Defendant's employees who had made notations on the medical record concerning the basis for these notes and discussions with other personnel concerning the records; and

g. Plaintiff would have been able to conduct discovery concerning the procedures of Defendant by which it claimed that it could not accept the medical opinion of Dr. Vora when she was on medical leave, the basis for that rule, whether it was a published rule applicable in all cases, whether it was uniformly applied or, if not, the reasons for variation in the application.

2. The decision of the Court Appeals of the Seventh Circuit was in conflict with decisions of the Court of Appeals of the Federal Circuit with respect to the right under FRCP Rule 56(f) to have necessary discovery in order to respond to a Motion for Summary Judgment. This conflict should be resolved because of its importance in the interpretation of the procedures to be followed under FRCP Rule 56. The resolution of this conflict is important in the administration of the rules relating to summary judgment and FRCP Rule 56 (f).

Rule 56(f) of FRCP provides for discovery by the party opposing a motion for summary judgment. Rule 56(f) provides:

> "(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Rule 56 (f) contemplates an affidavit by a party opposing the motion. Here, the Motion to Modify was signed by the attorney for Defendant. Defendant's attorney, in signing the motion, provided the equivalent of an affidavit. Under FRCP Rule 11(b), the attorney, in signing the motion, was certifying that to the best of his:

> ". . . knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (3) the allegations and other factual contentions have

> evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . ."

Because of the nature of the motion and the assertions made in the motion, there was nothing that could be added by an additional affidavit of Mrs. Lileikis. She would not be familiar with the need to conduct further discovery. The basis for the motion to permit discovery and the need for the information was within the professional knowledge of the attorney for Plaintiff. Under these circumstances, the affidavit of Plaintiff was not necessary and the motion signed by Plaintiff's attorney was sufficient.

In *Burnside-Ott Aviation Center v. United States*, 985 F.2d 1174 (Fed.Cir.1993), the trial court was reversed even though the request for discovery was made by motion and was not supported by an affidavit. The purpose of Rule 56(f) is to give the responding party access by deposition or other discovery in order to respond to the motion for summary judgment. Without the availability of FRCP Rule 56(f), a party responding to a motion for summary judgment would be helpless if the facts were beyond his or her reach since the opposing party under FRCP Rule 56(e):

> "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Burnside-Ott was filed by Burnside-Ott in the United States Court of Claims on a contract dispute. The government filed a motion to dismiss, Counts IV and V, for lack of subject matter jurisdiction. The Claims Court treated the government's motion to dismiss as a motion for summary judgment. On June 4, 1991, the Claims Court issued an order allowing Burnside-Ott 30 days from the date of that order:

> ". . . to conduct discovery limited to that which is necessary to respond to defendant's motion for summary judgment." The Claims Court ordered Burnside-Ott to file "[o]n or before July 5, 1991 . . . a supplemental response addressing those issues not briefed fully in its original May 13, 1991 response." On June 11, 1991 . . . a supplemental response addressing those issues not briefed fully in its original May 13, 1991 response." On June 11, 1991, Burnside-Ott served a Request for Admissions, Interrogatories, a Request for Production of Documents, and a Notice of Deposition on the government." *(Id.* 1577.)

Notices of depositions by Burnside-Ott were followed by objections of the government to notices. Thereafter, there were other discovery controversies which prevented Burnside-Ott from completing its discovery. The Claim Court on June 24, 1991, entered an extension of order at the request of the government stating:

> "The court's purpose in g ranting a 30 day discovery period was to give plaintiff a *limited opportunity* to gather information in order to file its supplemental brief. The court envisioned accomplishing this goal in a *very brief period*, and specifically did not want this

brief opportunity to turn into a protracted process." (*Id.* 1577.) (Emphasis in original.)

Burnside-Ott on July 12, 1991 filed a further motion for continuance based on its inability to complete its discovery and obtained needed information. On August 21, 1991, the Claims Court granted summary judgment.

On the appeal, the Court of Appeals stated:

". . . the Claims Court erred in granting summary judgment on this issue without allowing adequate discovery. In other words, because of the trial court's error about intent, it cut short discovery. While this court encourages proper case management to avoid the expense of unnecessary discovery, the case demands adequate discovery.

'The Supreme Court has made clear that summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery.' *Dunkin's Donuts of America v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed.Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 165 (1986)). Indeed, summary judgment should 'be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.' *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 n. 5, 106 S.Ct. 1505, 2511 n. 5, 91 L.Ed.2d 202 (1986).

The Claims Court did put Burnside-Ott on notice that it intended to treat the government's motion to dismiss as a motion for summary judgment. As such, Burnside-Ott was on notice that it had to come

> forward with all of its evidence. However, the time provided to Burnside-Ott in which it could conduct discovery in order to gather such evidence was so limited as to be inadequate under the circumstances of this case." (*Id.* 1582.)

Dunkin's Donuts of America, Inc. v. Metallurgical Exoproducts Corporation, 840 F.2d. 917 (Fed.Cir.1988) which was cited in *Burnside-Ott*, holds that the party responding to a motion for summary judgment must have adequate time for discovery. This case arose through a decision of the Trademark Office Trademark Trial and Appeal Board granting Metallurgical's motion for summary judgment. Metallurgical sought to register the mark DUNKIN DONUT as a trademark for "chemical deoxidizers, fluxing agents, and alloying compounds for ladle additions to molten metal." Dunkin opposed the motion before the Board which granted summary judgment in favor of Metallurgical. The Court of Appeals reversed stating:

> "The Supreme Court has made clear that summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 265 (1986). As to DDA's section 2(a) and section 2(d) claims, evidence of MEC's intent is pertinent. *University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 1374-78, 217 USPQ 505, 507-10 (Fed.Cir.1983). However, DDA has not had any opportunity to gather evidence through discovery on MEC's intent. In compliance with Fed.R.Civ.P.56(f), moreover, DDA's affidavit stated that DDA could not present sufficient facts to prove its case without discovery. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d

1560, 1566-67, 4 USPQ2d 1793, 1798-99 (Fed.Cir.1987). Therefore, the Board erred by prematurely granting summary judgment. We must vacate and remand for further proceedings."

3. The decision of the Court of Appeals of the Seventh Circuit is in conflict with the decision of the Court of Appeals in the Ninth Circuit which held that once an employer becomes aware of the need for accommodation, the employer has a mandatory obligation under ADA to engage in an interactive process with the employee to identify and implement reasonable accommodations. This is an important question for resolution by this Court on the duties and rights of the employer and the employee under the ADA.

Section 12112 of the Americans with Disabilities Act provides that the term "discrimination" includes:

"(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;" (42 U.S.C. §12112(b)(5)(A) and (B).)

In *Humphrey v. Memorial Hospitals Ass'n.*, 239 F.3d 1128 (9th Cir. 2001), Carolyn Humphrey was a medical transcriptionist for Memorial Hospitals Ass'n. ("MHA"). The court stated:

> "At the time of her termination, she was earning approximately $11.00 per hour. Humphrey's transcription performance was excellent and consistently exceeded MHA's standard of speed, accuracy, and productivity.
>
> In 1989, Humphrey began to experience problems in getting to work on time, or at all. She engaged in a series of obsessive rituals that hindered her ability to arrive at work on time. She felt compelled to rinse her hair for up to an hour, and if, after brushing her hair, it didn't "feel right," she would return to the shower to wash it again. This process of washing and preparing her hair could take up to three hours. She would also feel compelled to dress very slowly, to repeatedly check and recheck for papers she needed, and to pull out strands of her hair and examine them closely because she felt as though something was crawling on her scalp. She testified that these obsessive thoughts and rituals made it very difficult to get to work on time. Once she realized that she was late, she would panic and become embarrassed, making it even more difficult for her to leave her house and get to work.
>
> Due to Humphrey's difficulties with tardiness and absenteeism, MHA gave her a "Level I" disciplinary warning in June 1994. This warning required her to call her supervisor before the time she was due to be at work if she was going to be late or absent.

Humphrey's mental obsessions and peculiar rituals only grew worse after the warning, and her attendance record did not improve; nor did her call-in rate. In December 1994, she received a "Level III" warning, which documented four tardy days and one unreported absence over a two week period.

When MHA gave Humphrey the Level III warning, she was told that she was expected to schedule and keep counseling appointments with the Employee Assistance Program (EAP). This counseling consisted of "tips", helpful hints such as getting up earlier and laying out clothes the night before. Humphrey found this somewhat helpful and attended several sessions, but her efforts to follow the "tips" were not particularly successful. After watching an episode of the Oprah Winfrey show devoted to attention deficit disorder, Humphrey began to suspect that her debilitating symptoms and inability to get to work on time might be related to a medical condition. In May 1995, she asked MHA's EAP nurse, Elizabeth Pierson, if she could see a psychiatrist for an evaluation. Pierson agreed, and set up an appointment for a diagnostic evaluation and psychological testing with Dr. John Jacisin. MHA paid for the consultation through its EAP program.

Humphrey first saw Dr. Jacisin on May 12, 1995. Dr. Jacisin diagnosed her with obsessive compulsive disorder (OCD). He sent a letter explaining that diagnosis to Pierson on May 18, 1995, telling her that Humphrey's OCD "is directly contributing to her problems with lateness." In addition, the letter stated:

> I believe that we can treat this, although, the treatment may take a while. I do believe that she would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control.

Humphrey sought treatment from Dr. Jacisin and from a psychologist, Dr. Litynsky. Dr. Litynski, like Dr. Jacisin, diagnosed Humphrey with OCD and concluded that it was probable that the OCD caused her absenteeism and tardiness. Humphrey had difficulty paying for the necessary services, however, because her insurance did not cover the treatment. In addition, due to the severe symptoms of her ailment, Humphrey had great difficulty showing up for appointments. Both doctors considered her inconsistency in treatment in 1995 and 1996 to be the result of the disorder as well as her financial problems."
(*Id.* 1130-31.)

Thereafter, various suggestions were made accommodation, which were not feasible and on September 18, 1995 Humphrey sent a note to Pierson by e-mail stating:

> "Dear Liz:
> It has now been a few months since I sent you a memo regarding how my disability would best be accommodated as far as my job performance. I have since come to the conclusion that I would be able to put in considerable more hours [sic] and be much

more productive if I were able to work from my home as a lot of other transcriptionists are doing . . . . I think this would be the ideal way to accommodate my diagnosed disability." *Id.* 1131-32.

The court stated with respect to the request for accommodation:

"MHA allows certain medical transcriptionists to work out of their homes. Dr. Jacisin was not asked by anyone at MHA for his opinion on the work-at-home request. After Humphrey's termination, Jacisin said that working at home "might accommodate some of her work issues" but might be "anti-therapeutic." He testified, in his deposition in this lawsuit, that he felt working at home was an accommodation which would have been worth trying because it was necessary for Humphrey to earn money and increase her self-confidence.

In any event, Humphrey's request was summarily denied. In an e-mail message, Pierson denied her request for work-at-home accommodation on the ground of Humphrey's disciplinary warnings for tardiness and absenteeism. Pierson did not suggest an alternative accommodation or indicate that MHA would be receptive to reassessing its arrangements to accommodate Humphrey in light of the apparent failure of the flexible work schedule arrangement. Instead, she wrote:

> It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME ARRANGEMENT FOR

> TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work." (*Id.* 1132.)

Carolyn Humphrey's situation with respect to MHA was very similar to Nijola Lileikis' situation with respect to SBC Ameritech. The doctors opinion in each case expressed the need for accommodation. Each employee was prepared to work on an accommodated basis. In each case, the procedures of the employer supposedly prevented further consideration. In Humphrey's case, it was because her request for accommodation was made after her termination by MHA. In Lileikis' case, it was because she was unable to present the opinion of Dr. Vora because that opinion would be accepted only if she had returned to work, but at that point, she would be immediately terminated.

4. Plaintiff's attendance record was either irrelevant or was related to her depression.

At the close of its opinion, the Court of Appeals stated:

> "Finally, Lileikis' termination was clearly justified by her awful attendance record. She was suspended for attendance violations six separate times. Only her last

> suspension occurred while she was suffering from depression, and it was for an absence unrelated to her depression. She stopped coming to work on December 3, 1998. She was not terminated until July 30, 1999, after almost 8 month of continuous unexcused absences. She was fired because of her poor attendance record and because she eventually stopped showing up for work, not because she was disabled." (Appendix 10a.)

Plaintiff did not have an "awful attendance record" that justified her termination. The Court of Appeals apparently based its statement on that portion of Defendant's Statement of Uncontested Material Facts under the heading "Plaintiff's Absenteeism and Tardiness Record" (¶¶19-57). This includes a statement that "as early as the 1980s Plaintiff exhibited poor attendance" (¶23), a sequence of final warnings because of attendance including causes such as flu, illness, the illness of a child, oversleeping and stomach pain (¶¶24-27), short suspensions of one to five days in 1991 and 1992 (¶¶27-29). This last was canceled because she had prefect attendance for over a year. This was followed in 1994 through 1997 for various reasons including illness (¶¶31-39). She then had perfect attendance for six months. Then on June 23, 1998, she was again warned that her attendance record was reaching unsatisfactory levels which continued thereafter with a tardiness on August 17 (¶43). On June 23, 1998, she was told that "to avoid further disciplinary action, you will go through a period of zero tolerance for the next 6 months"(¶46). Thereafter, she missed two days on October 15 and 16, 1998 because of migraine headaches. On October 27, 1998, she was told by SBC Ameritech that her attendance record had been reviewed and that she had five days of chargeable absence and two hours of tardy and that now she would have to come to work as scheduled (¶50). She was told

that if there was another chargeable absence, she would be subject to the disciplinary process and disciplinary action including dismissal (¶55).

SBC Ameritech, through its Employee Assistance Program, referred her, because of her condition, to the Psychological Fitness Center. Her first contact was with Jean Ascher, the psychologist, on November 11, 1998. Plaintiff was then diagnosed with major depression. She continued seeing the psychologist and being treated by her until January 20, 1999. Plaintiff was seen by Dr. Vora on November 18, 1998 when he diagnosed her major depression and suggested her treatment. She continued with Dr. Vora through his written recommendation that she could return to work part-time on March 17, 1999. The references to the times when she was or was not at work between 1980 and 1998, as disclosed in the Defendant's records, was simply irrelevant to her absence from work because of her depression.

CONCLUSION

For the reasons stated, a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

John A. Cook
Counsel of Record
JOHN AUGUST COOK, P.C.
111 West Washington Street, Suite 1900
Chicago, IL 60602
Telephone: 312-807-4812
Facsimile: 312-807-4858

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-1573

[Filed January 22, 2004]

NIJOLA LILEIKIS,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
SBC AMERITECH, INC.,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 9554
David H. Coar, Judge

JUDGES: Before Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

On January 5, 2004, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the

judges on the original panel have voted to deny a rehearing and no judge in active service has requested a vote on the petition for rehearing en banc.[1] The petitions for rehearing and rehearing en banc are therefore DENIED.

---

[1] Circuit Judges John L. Coffey and Kenneth . . Ripple took no part in the consideration of the suggestion for rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-1573

[Filed December 15, 2003]

NIJOLA LILEIKIS,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
SBC AMERITECH, INC.,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 9554
David H. Coar, Judge

JUDGES: Before Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Nijola Lileikis, who suffers from depression, alleges she was terminated from her employment with SBC Ameritech in violation of the ADA. The district court granted Ameritech's motion for summary judgment, holding that Lileikis is not disabled within the meaning of the ADA and that her employment was legitimately terminated for violations of Ameritech's attendance policy. Lileikis appeals, and we view the facts, which are fairly undisputed, in her favor.

Lileikis began working for Ameritech in 1981 as a directory assistance operator in Chicago Heights, Illinois. She was required to sit at a keyboard wearing a headset, answer calls, look up phone numbers for the callers, give the number to the caller, and immediately hang up and answer another call. According to Lileikis, she was required to finish a call every 7 seconds, 8 hours per day, 5 days per week, a total of some 1,200 calls each working day. To Lileikis, this was a stressful job as it required a lot of contact with rude customers. She says that everybody who had the job hated it, and everybody who could leave it did. Lileikis, however, felt she couldn't leave the job because other positions with Ameritech were in Oak Brook and Elmhurst, Illinois, places that were too far away.

With directory assistance, time is of the essence. Ameritech is subject to fines if its operators do not answer customer calls quickly enough. Maintaining the proper number of operators on duty at any given time is therefore critical. To do so, Ameritech employs several strategies. Operators can take unpaid time off when call volumes are low and can work overtime during times when call volume is high. Ameritech also maintains a progressive discipline policy to discourage absenteeism. Employees receive a series of

warnings for unexcused absences. After a final warning, additional absences result in suspension. After suspension, Ameritech has the right to terminate employees who have further absences within 12 months. Twelve months of perfect attendance cancel the final warning for purposes of progressive discipline.

Lileikis's attendance history during her employment was spotty. She received warnings for poor attendance four times during her employment and was suspended five times through 1997.

Sometime in 1998, Lileikis began to suffer from depression. She could no longer talk on the telephone to customers without crying and had to pass every call to a service assistant. She was also unable to function at home. To cope, she took time off during low call-volume periods. She also called the employee assistance program to ask for help and was referred to a social worker. The social worker referred her to a psychiatrist, who verified she was suffering from "major depression single episode" and prescribed antidepressants.

During this time, Lileikis still had problems with her attendance. Although she was able to maintain perfect attendance long enough to downgrade her discipline level in early 1998, by June of that year she was again told that her attendance was unsatisfactory. In August 1998 she was tardy for work and was told she would be subject to dismissal if she was tardy twice more or had another chargeable absence. On October 8, 1998, she received written notification that further absences could result in further discipline or dismissal.

On October 15 and 16, 1998, Lileikis was absent from work due to a migraine headache. When she returned to work

she was reminded she could request these absences to be covered by the Family and Medical Leave Act (FMLA). She hadn't been seen by a doctor, though, so she was not eligible for leave under FMLA. As a result, she received her sixth suspension from work, this time for 5 days.

When Lileikis returned to work she met with her supervisor, who stressed the importance of coming to work as scheduled. Lileikis subsequently submitted a certificate completed by her psychiatrist requesting leave for October 15 and 16. Her psychiatrist, Dr. Vora, indicated she was suffering from "depression, insomnia, lack of motivation, lack of concentration, crying spells, [and] social withdrawal." Dr. Vora also indicated that Lileikis was unable to perform work of any kind.

On December 3, 1998, Lileikis did not report to work. She called to say she couldn't come in because of acute back pain. On December 4, 1998, she filed a short-term disability report over the telephone. On December 7, 1998, Ameritech sent her a letter detailing disability benefits and required documentation. On January 7, 1999, Lileikis's social worker sent her clinical notes regarding Lileikis's condition to Ameritech, which included a two-page summary of Dr. Vora's diagnosis. On January 27, 1999, Ameritech sent Lileikis a letter denying her claim for disability because the documentation did not indicate a severe impairment or refer to her functional capacity to perform her job. The letter also explained her right to appeal this denial of benefits.

Lileikis did not appeal, but neither did she return to work. On February 22, 1999, her supervisor explained over the telephone that Lileikis had exhausted the 60 days of FMLA time arguably available to her, and she should keep the office informed of her plans to start working again. On March 17,

1999, Lileikis saw Dr. Vora again and told him that she would rather commit suicide than go back to her job. She also said she might be able to handle working a few hours per day. Although he didn't evaluate whether she really could work part-time, Dr. Vora wrote a note stating she could return to work part-time on March 22, 1999. Lileikis didn't give this note to Ameritech. On April 12, 1999, Lileikis called her supervisor and learned she had to come back to work in order to receive retirement benefits. On April 19, 1999, she called her supervisor to learn whether she would be fired or suspended if she went back to work. Her supervisor told her she would not be fired if she wanted to retire, but despite what her supervisor said, Lileikis assumed she would be fired if she returned to work, so she still stayed home. On July 3, 1999, Ameritech sent her a letter indicating that if she did not report to work by July 30, 1999, she would be terminated. When Lileikis did not contact the office by July 30, she was terminated.

Lileikis filed a charge of discrimination under the Americans with Disabilities Act (ADA) with the Illinois Department of Human Rights. She simultaneously filed a charge of discrimination with the EEOC. In a strange turn of events, her Illinois complaint was dismissed at the agency level for want of prosecution, the details of which aren't important here. She appealed this decision to the Illinois appellate court, but instead of following through on that appeal, she decided to pursue her claim in federal court, leaving her Illinois case to again be dismissed for want of prosecution. She filed this lawsuit December 14, 2001. Ameritech then filed its motion for summary judgment, claiming that the state court dismissal was entitled to preclusive effect and that Lileikis is not disabled within the meaning of the ADA. The district court granted summary judgment, finding that although Lileikis's claim was not

precluded by res judicata, she was nevertheless not disabled within the meaning of the ADA and her employment was legitimately terminated for nondiscriminatory reasons.

We review grants of summary judgment *de novo*. *Molina v. Cooper*, 325 F.3d 963, 968 (7th Cir. 2003). Ameritech is entitled to summary judgment if there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Shermer v. Illinois Dep't of Transp.*, 171 F.3d 475, 477 (7th Cir. 1999).

In order to establish a prima facie case of discrimination, Lileikis must show that "(1) she is disabled under the ADA; (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) she has suffered from an adverse employment decision because of her disability." *Dvorak v. Mostardi Platt Assoc., Inc.*, 289 F.3d 479, 483 (7th Cir. 2002).

Under the ADA, a disability is a physical or mental condition that substantially limits one or more of a person's major life activities, when a person has a record of such a condition, or is regarded as having such a condition. 42 U.S.C. § 12102(2). A "qualified individual with a disability" is a person with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8).

Lileikis contends that her depression substantially limits her in the major life activity of working, and that she cannot perform the essential functions of the directory assistance position without the accommodation of part-time employment. However, in order to establish a claim that she is substantially impaired because of her inability to work, she must prove that she cannot perform either an entire class of jobs or a broad

range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3)(i). Inability to perform a single job because of an impairment does not support a claim that one has a substantially limiting impairment. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). The flaw in Lileikis's case is that she never mentions a single other job that she is unable to do because of her depression, much less a class of jobs that she cannot perform. She is thus not a person with a disability under the ADA.

Even if Lileikis were disabled, she would need to show that she can perform the essential functions of her job with or without reasonable accommodation. Lileikis says she is able to perform the essential functions of her job with an accommodation of part-time work, but part-time work is not a reasonable accommodation for a full-time job. *DeVito v. Chicago Park Dist.*, 270 F.3d 532 (7th Cir. 2001). Lileikis does not dispute the full-time nature of her job and has also testified that she cannot work full-time. The only argument to the contrary in Lileikis's brief is a single sentence: "There is nothing in Dr. Vora's statement of part-time work that indicated [Lileikis] never would be able to work full-time." But Lileikis, of course, has the burden of proving that there is a reasonable accommodation which would allow her to resume working full-time, and her "evidence" of this is lacking. She has failed to prove she can perform the essential functions of her job with or without a reasonable accommodation.

Finally, Lileikis's termination was clearly justified by her awful attendance record. She was suspended for attendance violations six separate times. Only her last suspension occurred while was suffering from depression, and it was for an absence unrelated to her depression. She stopped coming to work on December 3, 1998. She was not terminated until

July 30, 1999, after almost 8 months of continuous unexcused absences. She was fired because of her poor attendance record and because she eventually stopped showing up for work, not because she was disabled.

The judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 9554

February 6, 2003, Decided
March 13, 2003, Docketed

NIJOLA LILEIKIS,
Plaintiff,

v.

SBC AMERITECH, INC,
Defendant.

David H. Coar, United States District Judge

MEMORANDUM OPINION AND ORDER

This case comes before the Court on Defendant SBC Ameritech's Motion for Summary Judgment. For the reasons set forth in this opinion, Defendant's Motion for Summary Judgment is granted.

FINDINGS OF FACT

Plaintiff Nijola Lileikis ("Plaintiff" or "Lileikis") was employed by Defendant SBC Ameritech, Inc. ("Defendant" or "Ameritech") as a Directory Assistance Operator at its Network Services Business unit in Chicago Heights, Illinois. Plaintiff began working for Ameritech as a Directory Assistance Operator on June 26, 1981. The Chicago Heights office was one of six Ameritech facilities that together are responsible for providing directory assistance to 2.3 million customers a day.

Plaintiff's job consisted of sitting at a computer keyboard with a headset. She would push a button to connect with a caller, and the caller would then request a directory listing, usually a phone number. Plaintiff would provide the customer with the number and then immediately take another call. Plaintiff believed that she served between 1200 and 1300 customers a day.

In the field of directory assistance, time is of the essence. If Defendant Ameritech did not provide service to callers within a set number of seconds, Ameritech could be subject to fines and penalties. According to Plaintiff's uncontested deposition testimony, she was responsible for helping customers courteously, accurately and within seven seconds, eight hours a day, five days a week.

Ameritech maintained multiple strategies to maintain full, fast service to its customer base with a minimum of operator idleness. One strategy it pursued was to offer unpaid Excused Time, or "E-time", to its operators during periods with few customer queries. At any given time, there might be full days of E-time available or there might be none at all. Plaintiff took full advantage of E-time whenever it became available.

Another strategy was to offer optional overtime to its employees during periods with many customer queries. Plaintiff almost never took advantage of optional overtime when it was available.

A third strategy was to implement a fairly strict progressive discipline policy to discourage employee absenteeism. At Ameritech, employee attendance was unacceptable when chargeable absences, i.e. those not covered by paid leave, approved as a disability, or taken under the Family and Medical Leave Act, reached four days or three cases within a 12 month period. Absent employees would initially receive a warning for their absence; after the accumulation of one or more warnings, further absences within 6 months would result in a written final warning. An employee who accrued further absences within twelve months of a final warning could be suspended from work. After suspension, the company had a right to terminate an employee if further absences occurred within twelve months. After twelve months of perfect attendance, the final warning would be cancelled for the purposes of further discipline, but it would not be expunged from the employee's record.

Plaintiff's attendance history during her employment was spotty. Lileikis received final warnings for poor attendance in 1986, 1989, 1991, and 1994. Lileikis was suspended from work for poor attendance on July 9, 1991 (one day suspension), November 26, 1991 (two day suspension), January 27, 1992 (five day suspension), August 3, 1994 (four day suspension), and in November 1997 (four and a half day suspension). Twice during her tenure, in February 1993 and September 1995, Plaintiff did have final warnings cancelled after 12 months of perfect attendance.

In late 1997 and into 1998, Plaintiff continued to struggle with her attendance. After her November 1997 suspension, Plaintiff was informed in writing that she needed to maintain six months of perfect attendance or she would be subject to further discipline. After six months of perfect attendance, Plaintiff was informed that she had been downgraded from the post-suspension level of discipline to the pre-final warning level. Shortly thereafter, on June 23, 1998, Plaintiff was again informed that her attendance record was unsatisfactory, and there would be zero tolerance for absences for six more months. In August 1998, Plaintiff was tardy for work, after which she was informed that if she was tardy twice more or had another chargeable absence, she could be subject to dismissal. On October 8, 1998, Plaintiff received a written notification from her supervisor, repeating again that Plaintiff's attendance record was poor and any further absences could result in further discipline, up to and including dismissal.

On October 15 and 16, 1998, Plaintiff was absent from work due to a migraine headache. When she returned to work, Plaintiff was reminded that she could file a request for those absences to be covered by the Family and Medical Leave Act. Plaintiff submitted that she had not visited a doctor for her condition, so she could not satisfy the Ameritech policy, which required supporting medical documentation to approve requests for leave under the Family and Medical Leave Act. As a result of these absences, Plaintiff received her sixth suspension from work, this for five days.

When Plaintiff returned from her suspension, she had a post-suspension meeting with her supervisor, Gladys Hanner, Ms. Hanner reiterated the seriousness of Plaintiff's poor attendance record, and stressed that Plaintiff was required to

come to work as scheduled. Between her return to work on October 27 and December 3, Plaintiff filled out a "Health Care Provider's Certificate" ("certificate") in support of a request for leave. (Pl. Dep. Ex. 18) The certificate, which Plaintiff signed on November 18, 1998, requested leave for the days she was absent with the migraine, October 15 to October 18, 1998, and from December 3, 1998 to March 3, 1998 [sic]. (Id.) The health care provider's portion of the certificate was completed by Dr. Mahim Vora.[1] (Id.) Dr. Vora indicated on the form that Plaintiff suffered from "depression, insomnia, lack of motivation, lack of concentration, crying spells, [and] social withdrawal" beginning in August 1998 with "duration undetermined." (Id.) Dr. Vora also indicated that Plaintiff was unable to perform work of any kind. (Id.)

On December 3, 1998, Plaintiff did not report to work. She telephoned that she was unable to report to work because of acute back pain. On December 4, 1998, Plaintiff filed a short term disability report via telephone with Ameritech. (Pl. Dep. Ex. 10) On December 7, 1998, Defendant mailed

---

[1] Plaintiff does not contest that the documents contained these assertions, but she does contest whether they would be admissible without Dr. Vora's deposition. In the absence of testimony, Dr. Vora's assessment of Plaintiff would be inadmissible to prove the truth of the diagnosis. In response to a motion for summary judgment, however, Plaintiff must come forward with evidence in support of her claim. Since Plaintiff would be required to prove at trial that she suffered from a qualified disability under the ADA, the Court will consider Dr. Vora's assessment as there is no other objective evidence before it. Dr. Vora's assessments will also be used to demonstrate the quantum of information available to Defendant when it made the decision to terminate Plaintiff's employment.

Plaintiff a letter detailing the policies relating to Sickness Disability benefits, which included a description of the necessary medical documentation. (Pl. Dep. Ex. 11) On January 7, 1999, Jean Ascher, a Licensed Certified Social Worker, sent further information relating to Plaintiff's condition to Defendant. The bulk of the documents were the social worker's notes, but the documents also contained a two page summary diagnosis from Dr. Mahim Vora diagnosing Plaintiff with "Major Depression, Single Episode."[2] (Pl. Dep. Ex 12) On January 27, 1999, Defendant mailed Plaintiff a letter denying her claim for Sickness Disability benefits because the medical documentation she provided did not indicate "severe impairment or reference to [her] functional capacity . . . to perform [her] occupation as an Operator with or without reasonable accommodation." (Pl. Dep. Ex 14) The letter also informed Plaintiff of her right to appeal the denial of Sickness Disability benefits. (Id.)

Plaintiff did not file an appeal of the denial of her Sickness Disability benefits. On February 22, 1999, Plaintiff spoke with her supervisor on the telephone. (Pl. Dep. Ex. 38, at D000422) Her supervisor informed Plaintiff that she had exhausted the 60 days of FMLA time arguably available to her, and that she should keep the office informed about her plans regarding a return to work. (Id.) At some point in March, Plaintiff received a handwritten note from Dr. Vora,

---

[2] As with Dr. Vora's assessment on the initial Health Care Provider's Certificate, Plaintiff contests the admissibility of Ms. Ascher's notes without her deposition. Again, Plaintiff would be required to prove she was disabled at trial, therefore she must come forward with sufficient evidence to defeat the summary judgment motion. Ms. Ascher's written notes will be used as evidence of Plaintiff's condition and to demonstrate the quantum of information available to Defendant at the time of Plaintiff's termination.

dated March 17, 1999, which read in its entirety: "Ms. Nijola Lileikis is under my care. In my opinion she can return to work on Part time basis on 3-22-99." (Pl. Dep. Ex 16) Though she may have spoken with her supervisor by telephone about this note, she did not submit this note to Defendant at any time. (Pl. Dep. at 99-100) On April 12, 1999, Plaintiff called her supervisor to inquire about retirement benefits. (Pl. Dep. Ex 38, at D000422) Plaintiff called her supervisor again on April 19, 1999 to learn whether she would be fired or suspended if she returned to work, as she had to return to work to be eligible for retirement benefits. (Pl. Dep. Ex 38, at D000422-D000423) Her supervisor informed her that she would not be fired if she wanted to retire, but Plaintiff assumed she would be fired if she returned to work. On July 3, 1999, Defendant mailed Plaintiff a certified letter indicating that if she did not report to work either in person or by telephone by July 30, 1999, she would be terminated. When Plaintiff did not contact the office by July 30, she was terminated, effective July 30, 1999.

On August 19, 1999, Plaintiff filed a charge of discrimination under the Americans with Disabilities Act (ADA) with the Illinois Department of Human Rights. She simultaneously filed a charge of discrimination with the EEOC. Plaintiff's attorney was out of town on March 3, 2000, the date of the scheduled hearing before the Illinois Department of Human Rights, and his written request to reset the hearing date was ignored and eventually denied. Plaintiff appeared at the hearing with her husband and a representative of her attorney, and again the request for a continuance was denied. Plaintiff refused to proceed without her attorney present and the claim was dismissed for lack of participation. Plaintiff appealed to the Chief Legal Counsel for the Illinois Department of Human Rights, and her appeal was denied.

Plaintiff then filed a notice of appeal to the Chief Legal Counsel's decision in the Illinois Appellate Court, but Plaintiff abandoned that action in favor of a complaint in federal court, so the appeal was dismissed for want of prosecution.

On October 1, 2001, Plaintiff received a right to sue letter from the EEOC. (Pl. Dep. Ex. 3) She filed this lawsuit December 14, 2001. Defendant filed its Motion for Summary Judgment in October 2002.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure should only be granted if the evidence presented to the court in support of the motion demonstrates that there are no genuine issues of material fact to submit to a jury and the moving party is entitled to prevail as a matter of law. *See Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 709 (7th Cir. 2002). To defeat the motion, the non-moving party must come forth with sufficient evidence to demonstrate the existence of a genuine issue of material fact on each of the material elements of the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ("a complete failure of proof concerning an essential element of the [non-movant's] case necessarily renders all other facts immaterial"). Where there is competing proof, the Court makes all reasonable inferences in favor of the non-moving party.

DISCUSSION

Defendant's summary judgment motion presents two principle issues. First, whether the determination of Plaintiff's discrimination complaint in the state system should preclude

this Court's consideration of the merits of Plaintiff's federal complaint. Second, whether Defendant is entitled to a judgment on the merits of that complaint. The Court will address each argument in turn.

I. Whether the state court determination is entitled to preclusive effect.

Defendant has suggested that the state court determination of Plaintiff's discrimination claim should be binding on this court under the full faith and credit provisions of 28 U.S.C. § 1738. Under the full faith and credit provisions, this Court is required to give the same preclusive effect to state court judgments that those judgments would receive in the courts of the same state. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982). The controlling question, then, is this: what, if any, preclusive effect would the state administrative hearing followed by the state appellate court's dismissal for want of prosecution have in the Illinois state court system?

In Illinois, the doctrine of res judicata bars relitigation of claims when three requirements are met: (1) a court of competent jurisdiction has entered a final judgment on the merits; (2) the causes of action are identical; and (3) the parties are functionally identical in both causes of action. *See Wenig v. Lockheed Environmental Systems & Technologies Corp.*, 312 Ill. App. 3d 236, 726 N.E.2d 645, 647, 244 Ill. Dec. 670 (Ill. App. Ct. 2000) (citing *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 665 N.E.2d 1199, 1204, 216 Ill. Dec. 642 (Ill. 1996). Here, the causes of action on the complaint filed with the Illinois Department of Human Rights and in federal court are functionally identical, and the parties are absolutely identical. The difficulty arises in determining

whether the initial state case proceeded to a final judgment on the merits.

There are several hurdles to the Defendant's characterization of the disposition of the state human rights complaint as a final judgment on the merits. First, the initial judgment on the state court side was entered by an administrative body, not a court. In Illinois, res judicata applies to administrative determinations that are adjudicatory, judicial, or quasi-judicial in nature. *See Powers v. Arachnid, Inc.*, 248 Ill. App. 3d 134, 617 N.E.2d 864, 867, 187 Ill. Dec. 407 (Ill. App. Ct. 1993). The administrative hearings of the Illinois Department of Human Rights have most of the hallmarks of a judicial trial, including professional legal representation, the opportunity to present evidence, the opportunity to object to evidence, and final findings of fact. As such, they should be considered judicial in nature.

The hearing Plaintiff had before the Illinois Department of Human Rights in this case, however, had some significant shortcomings. First, she was not represented by counsel. She had retained an attorney for the hearings (the same attorney who represents her now), but he was unavoidably out of town on the date of the hearing. A written request for a continuance that was sent to the hearing department 27 days before the hearing went unanswered and ignored. When Plaintiff appeared at the hearing, her reiterated request for a continuance so she could appear with the benefit of counsel was denied. The position of the Department of Human Rights, apparently, is that Plaintiff's attorney never filed a notice of appearance on her complaint, therefore they did not recognize Plaintiff as a represented party. Whether they did or did not have notice of Plaintiff's attorney is a collateral matter not before this Court. What is clear is that Plaintiff elected not to present any testimony at the hearing rather than proceed at

her own peril without the benefit of counsel. As a consequence, the hearing officer dismissed her complaint for lack of participation.

This leads into the second significant shortcoming of the administrative hearing: it did not produce any conclusions, legal or factual, on Plaintiff's discrimination complaint. This would not ordinarily be a problem, as the res judicata doctrine applies with equal force to claims that *could* have been litigated to a final conclusion as it does to claims that were actually litigated. *See Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 665 N.E.2d 1199, 1204, 216 Ill. Dec. 642 (Ill. 1996). In the federal courts, however, the preclusive effect of administrative agency decisions is limited to the issues of fact. *See Allahar v. Zahora*, 59 F.3d 693, 696 (7th Cir. 1995) ("Agency decisions may have a preclusive effect, but only in the limited area of factfinding."). Here, the dismissal of the complaint for lack of cooperation at the adminstrative level was a final determination, but the agency did not reach any conclusions as to the factual issues presented in Plaintiff's complaint to the Human Rights Department.

Defendant asserts that the appeals of that initial determination, first to the chief legal counsel of the Human Rights Department, and then to the Illinois Appellate Court, ought to foreclose further hearing of this claim in federal court. The Illinois Appellate Court dismissed Plaintiff's appeal for want of prosecution. Under Illinois law, "a dismissal for want of prosecution is ordinarily not a final order because of plaintiff's right to refile under Section 13-217 of the Code of Civil Procedure." *Allstate Ins. Co. v. Andersen*, 329 Ill. App. 3d 93, 768 N.E.2d 329, 331, 263 Ill. Dec. 569 (Ill. App. Ct. 2002). This seemingly straightforward procedural rule is not easily applied to the circumstances of this case.

As a preliminary matter, the Illinois Supreme Court declared Section 13-217 of the Illinois Code of Civil Procedure (along with the rest of the 1995 civil procedure amendments) to be unconstitutional in 1997. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (Ill. 1997); *see also Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 754 N.E.2d 429, 257 Ill. Dec. 771 (Ill. App. Ct. 2001). The decision in *Best* voids all the 1995 amendments, so the previous version of the statute, 735 ILCS 5/13-217 (West 1994), governs. The previous version of the statute permitted the Plaintiff "one and only one refiling of an action" after a voluntary dismissal for want of prosecution. *Hurst v. Capital Cities Media, Inc.*, 754 N.E.2d at 438. If the rule applies, then Plaintiff would have one opportunity to refile the claim within one year after the dismissal for want of prosecution.

It is not at all clear that this procedural rule, which Plaintiff seeks to apply, applies to rulings of the appellate court. The rule that a dismissal for want of prosecution is not a final order primarily dictates the appeal rights of the Plaintiff who suffered the dismissal. *See, e.g., Wilson v. Evanston Hosp.*, 257 Ill. App. 3d 837, 629 N.E.2d 589, 591, 196 Ill. Dec. 44 (Ill. App. Ct. 1994) ("There is no question that in the State of Illinois the dismissal of a case for want of prosecution is not a final order *for appeal purposes* because plaintiffs have an absolute right to refile the cause of action within one year of the dismissal.") (emphasis added). If the rule applied directly on appeal, the appellate court ruling would not preclude Plaintiff's complaint in this case, as Plaintiff filed her federal complaint within one year of the date that the Illinois Appellate Court dismissed her appeal for

want of prosecution.[3] But this Court is not at all convinced that this rule, which Plaintiff seeks to apply, applies directly to dismissals at the appellate level.

In the usual course, any dismissal at the appellate level could only occur after a determination on the merits of the claim in the lower courts. The Illinois rule permitting refiling after the dismissal for want of prosecution makes sense at the level of the trial court, as it would mitigate the harsh effects of the dismissal on plaintiffs. At the appellate level, plaintiffs who fail to pursue their appeals are not in the same position as those who, for whatever reason, neglect their complaint at the trial court level.

In this case, although Plaintiff suffered a dismissal for want of prosecution at the appellate level, her position more closely resembles a plaintiff whose claim was dismissed at the trial level. No court or administrative body has yet made any determination on the underlying merits of her discrimination complaint. As is becoming clear, this is an unusual case.

There are two somewhat similar cases that provide guidance for the Court's determination of this issue: one comes from the Seventh Circuit and one comes from the Illinois court system. In both cases, the plaintiff pursued relief in the state and federal systems. In both cases, the complaint in one of the systems was dismissed for want of prosecution. And in both cases, the previous case did not preclude a holding on the merits in the subsequent case. In the Seventh Circuit case of *Allahar v. Zahora*, 59 F.3d 693 (7th Cir.

---

[3] The Illinois Appellate Court dismissed her appeal on August 9, 2001. She filed her federal complaint on December 14, 2001.

1995), the plaintiff had dual filed complaints with the EEOC and the Illinois Department of Human Rights, as did Plaintiff Lileikis. There, the Seventh Circuit did not find the claim precluded. In so doing, the court noted that the "dismissal was certainly not based on the merits of the case nor did any factfinding occur at that juncture." *Allahar*, 59 F.3d at 696. In the Illinois case, *Wenig v. Lockheed Environmental Systems & Tech. Co.*, 312 Ill. App. 3d 236, 726 N.E.2d 645, 244 Ill. Dec. 670 (Ill. App. Ct. 2000), plaintiff filed a complaint with a federal administrative law judge that he was fired in retaliation for reporting under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Rather than pursuing his complaint in the federal system, the plaintiff in *Wenig* sought relief in the state courts. In deciding that the previous judgment should not have preclusive effect, the Illinois court noted that "the dismissal of plaintiff's Department proceeding was not the result of a hearing on the merits or factfinding by the ALJ, but the result of Plaintiff's efforts to withdraw his Department proceeding so he could proceed... in the state circuit court." *Wenig*, 726 N.E.2d at 649.

One critical difference between those two cases and this case is that here, Plaintiff did have a scheduled hearing on the merits before the Illinois Department of Human Rights. The hearing, as noted above, did not result in any factfinding. This Court finds that Plaintiff's lack of participation in the hearing under the circumstances was reasonable. Furthermore, if Plaintiff had pursued her state court appeal to its completion, it is probable that the Illinois appellate court would agree. *See Kessling v. U.S. Cheerleaders Ass'n*, 215 Ill. App. 3d 582, 574 N.E.2d 1370, 1371, 158 Ill. Dec. 977 (Ill. App. Ct. 1991) (holding that a trial court abused its discretion to dismiss a complaint for want of prosecution on the sole basis that plaintiff's attorney was not present at a

status hearing). This Court holds that it is unlikely that the Illinois courts would give preclusive effect to the determination of Plaintiff's state discrimination complaint, with all its irregularities. Consequently, it will not be given preclusive effect here.

II. Whether Plaintiff can proceed to trial on her discrimination claim.

In order to sustain her claim of discrimination based on her disability, Plaintiff must prove three things: (1) that she is disabled within the meaning of the Americans with Disabilities Act (ADA); (2) that she is qualified to perform the essential functions of the job either with or without reasonable accommodation; and (3) she suffered an adverse employment action because of her disability. *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 950 (7th Cir. 2000). The Court only needs to review the evidence as to the first and third element of the claim.

A. Is Plaintiff disabled within the meaning of the ADA?

Plaintiff must demonstrate that there is a genuine issue of material fact as to whether she is a qualified individual with a disability under the terms of the Americans with Disabilities Act (ADA). Defendant contends that the Plaintiff is not disabled within the meaning of the ADA. Major depression can constitute a disability under the ADA, *see Ogborn v. United Food & Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767 (7th Cir. 2002), but in order to qualify, the major depression must substantially limit the major life activities of the Plaintiff. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S. Ct. 2139, 144 L. Ed. 2d 450

(1999). Here, Plaintiff suggests that her disability substantially limits her ability to perform her job.

The Supreme Court suggested a cautious approach when the major life activity alleged to be substantially limited is that of working. *Sutton v. United Air Lines, Inc.*, 527 U.S. at 492 ("There may be some conceptual difficulty in defining 'major life activities' to include work ... Indeed, even the EEOC has expressed reluctance to define 'major life activities' to include working...."). In order to meet the statutory definition of disability, Plaintiff must, "at a minimum" "allege that [she is] unable to work in a broad class of jobs." *Sutton*, 527 U.S. at 491. According to federal regulations, "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

The evidence in this case overwhelmingly demonstrates that Plaintiff was emotionally incapable of performing her job as a directory assistance operator. The notes of her sessions with her social worker and her psychiatrist demonstrate Plaintiff's unhappiness with her job. The social worker's initial interview notes that Plaintiff "is stressed at work and at home... [She] hates her job, but needs to stay for the insurance." (Pl. Dep. Ex. 12) In the psychiatrists's description of her "presenting problem," he writes, "Her job is very stressful. She does not like her job. She gets along well with her co-workers and there are no interpersonal problems at job." (Pl. Dep. Ex. 12) By January 6, 1998, Plaintiff had not been to work for over a month. According to the social worker's notes from an interview on that date, Plaintiff was already reporting that she felt better: "she feels less depressed and can even joke and laugh." (Pl. Dep. Ex 12) During her deposition, Plaintiff affirmed that she told her social worker during that interview that she would "rather

commit suicide than return to work." (Pl. Dep. at 92) She made it clear that she had no intention nor desire to return to work for Defendant.

Plaintiff has not demonstrated a genuine issue of material fact as to whether her depression constituted a disability under the ADA. The evidence before the Court demonstrates convincingly that Plaintiff despised her job, but it does not demonstrate that Plaintiff was disabled within the meaning of the ADA. There is no evidence that Plaintiff would have been unable to perform any other job due to her depression. The Court is sensitive to the crippling capacity of depression as a disability, but on the record before it, it does not appear that Plaintiff's depression crippled her ability to do anything but work as a directory assistance operator. Working as a directory assistance operator is a high stress occupation that would clearly require a great deal of patience, skill, and endurance. It seems that Plaintiff's reserves of those qualities may have expired after seventeen years. While for Plaintiff, that is regrettable, it does not constitute a disability under the ADA. On this basis alone, Defendant would be entitled to Summary Judgment.

B. Did Plaintiff suffer an adverse employment action because of her disability?

As the Court has already determined that Plaintiff did not have a disability within the meaning of the ADA, any adverse employment action that Plaintiff suffered could not have been because of her disability in violation of the ADA. The Court addresses this element of Plaintiff's case, however, to demonstrate that even if Plaintiff were disabled within the meaning of the ADA, there is no genuine issue of material fact as to whether she suffered an adverse employment action on that basis.

As detailed above in the recitation of facts, Plaintiff's attendance record at work was spotty for virtually her entire seventeen year tenure at Ameritech. Plaintiff asserts that she believed that prior attendance problems were expunged after six or twelve months of perfect attendance. Ameritech's policy was to allow six or twelve months of perfect attendance to diminish the level of discipline that employees would receive for further violations, but there is no evidence that Ameritech indicated to its employees that past violations would be completely expunged from their employment record.

For almost eight months preceding her termination from Ameritech, Plaintiff did not report to work. In the months preceding her lengthy unauthorized absence, she was suspended for the sixth time for missing work. Plaintiff had been told repeatedly in person and in writing that her attendance pattern was unacceptable. During her unauthorized absence, Plaintiff did file a claim for disability benefits, a claim which was reasonably denied on the supporting evidence that Plaintiff conveyed to Ameritech. Plaintiff was informed, in writing, of her rights to appeal the denial of disability benefits. Plaintiff did not appeal. Nor did she return to work. Even if Plaintiff's claim had been granted, by its terms, her request for disability leave would have lapsed in March 1999. Plaintiff believed that if she did return to work, she probably would have been fired. Fear of termination does not justify a failure to report to work. Under the circumstances, Defendant Ameritech gave Plaintiff ample opportunity to return to work to discuss the options available to her. When Plaintiff never did return to work, they fired her almost eight months after she stopped reporting to work.

Plaintiff asserts that she had a note from her psychiatrist indicating that she could return to work part-time in March

1998. If she were disabled, under some circumstances, this could be a reasonable accommodation. Plaintiff, however, never submitted this handwritten note to her employer. Having never received the note, Defendant cannot be expected to make an assessment of whether this was a reasonable accommodation.

Claiming a disability does not afford employees the unilateral right to set the terms of their employment and eventual return to work. Here, Plaintiff filed a disability claim. After the claim was denied, Plaintiff did nothing. She did not appeal, she did not return to work, she did not submit supplementary documentation detailing her disability. Defendant Ameritech's decision to terminate her employment in July 1998 was imminently reasonable, and it was unrelated to her disability claim.

CONCLUSION

For the reasons stated in this opinion, Defendant's Motion for Summary Judgment is granted. Judgment will be entered in favor of Defendant Ameritech.

Enter:

/s/_____
David H. Coar
United States District Judge